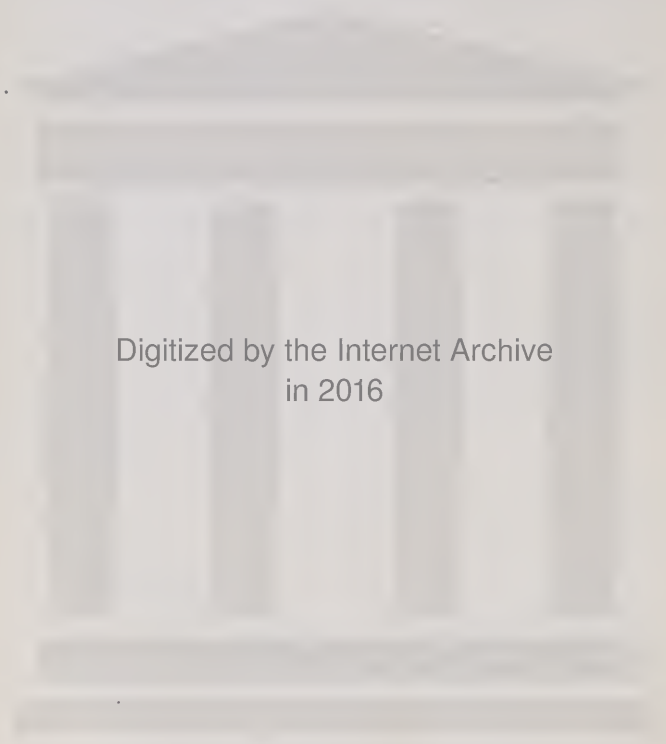

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SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

MERENSKY-BIBLIOTEEK
3 AUG 1954
Klasnommer 34(68)
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(North-Eastern Division)

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G.P.-S.4265—1949-50—500.

CASE No. 8 OF 1949.

REMOD NKABINDE (Appellant/Applicant) *v.* ELIAS NKABINDE (Respondent).

(N.A.C. Case No. 46/1/48.)

VRYHEID: Tuesday, 5th April, 1949: Before Steenkamp, President, Robertson and Oftebro, Members of the Court (North Eastern Division).

Practice and Procedure—Application condonation late appeal—Attorney's closing office—Applicant's attitude in Court below. Application to set proceedings aside—not allowed where Applicant had ample opportunity to plead and to give evidence—Applicant's passive attitude in Court below.

Held: It is no good ground for condonation of late noting of appeal if Attorneys choose to close their offices and appeal is not noted in time.

Held: Applicant was given ample opportunity to plead in the Court below, or to give evidence, but he chose to take up an insolent attitude towards the Bench and he cannot now be heard in an application to have the proceedings set aside, which, on the summons and plea, were in perfect order.

Appeal from the Court of the Native Commissioner, Dannhauser.

Steenkamp, President (delivering the judgment of the Court):—

This is an application for the condonation of the late noting of an appeal.

The respondent sued the applicant in the Native Commissioner's Court, Dannhauser, for estate property and also for £4 cash lent and advanced to the latter. On the day of the hearing of the case the applicant, who was the defendant, pleaded as follows:—

> " I know nothing of the claims. Plaintiff has never asked for or demanded payment. I deny liability and put him to the proof thereof."

The respondent (plaintiff) gave evidence and called three witnesses to support his claim. Defendant (applicant) was given an opportunity to cross-examine the witnesses, and it is significant to record that he only asked the respondent one question, the reply to which was:—

> " I say you were sick in Johannesburg."

After the second witness had given evidence in chief, the applicant instead of cross-examining him stated as follows:—

> " I do not know this witness. I have nothing to ask him."

Similar statements were made after the two other witnesses had given their evidence in chief.

After respondent had closed his case, the applicant was called upon to lead evidence in defence of the claim and the following note appears on the record:—

> " Defence: Defendant has no witnesses to call. He states: ' I have nothing to say. I know nothing about this case. I don't know where my father died.' The position in law is explained to the defendant. He adopts an insolent attitude, and although he is advised by the Court to call his mother, or other witnesses to refute, if possible the claim of the plaintiff, he persists and says he has not witnesses and nothing to say."

The Native Commissioner thereafter on the 10th June, 1948, gave judgment for the plaintiff (respondent) as claimed, with costs.

Applicant went to a firm of Attorneys at Newcastle and caused an appeal to be noted on the 2nd July, 1948, but the notice of appeal was not stamped in accordance with the Rules until the 12th July, 1948. In the first instance, even if the notice of appeal had been stamped, it was noted late, and an application for condonation of the late noting is based on the fact that the Attorney was absent from his office during the latter part of June, 1948, and therefore could not note the appeal in time.

In the case of Somtunzi *v.* Sikiti, 1947, N.A.C. (T. & N.) 62, it was held that it is no good ground for condonation of late noting of appeal if Attorneys choose to close their offices and appeal is not noted in time. In his affidavit, applicant's Attorney gives no reason for his absence from his office. All he states is that " at this time and for the remainder of the month of June I was absent from my office and no notice of appeal was filed."

The reasons are therefore without substance and are not sufficiently strong enough for this Court to grant the necessary indulgence.

In a supplementary application, applicant's Attorneys filed additional grounds of appeal which read as follows:—

> " The learned Native Commissioner should have dismissed respondent's claim for eight (8) head of cattle or their value on the grounds that there was *Res Judicata* and a final judgment delivered in the case of Elias Nkabinde *v.* Ramoth Nkabinde case No. 12/1948, a copy of which is annexed hereto."

This is an attempt to supplement the plea to the claim, pleading *res judicata*. In other words, application is now made to set aside the proceedings in the Native Commissioner's Court to enable the applicant to file a plea in bar.

Applicant was given ample opportunity to plead in the Court below, or to give evidence, but he chose to take up an insolent attitude towards the Bench and he cannot now be heard in an application to have the proceedings set aside, which, on the summons and the plea, were in perfect order.

It is to be remarked that the record on which it is relied that the case had been previously tried, was out of the Court of the Native Commissioner of Newcastle (Case No. 12/1948) whereas the present appeal is based on a record from the Native Commissioner, Dannhauser (Case No. 3/1948). Record No. 12/1948 (Newcastle) is not dated, nor is the date of judgment recorded, and therefore it is not clear which case was tried first. A copy of the Newcastle record is attached to the application, and in that case the applicant also took up a passive attitude and did not give evidence.

The applicant has only himself to blame for the position in which he finds himself, and if he will treat Court proceedings with the contempt he did, he must not come to this Court to ask for indulgence or relief.

The application was dismissed with costs.

For Appellant: Mr. A. G. Turton instructed by Messrs. Pike, Shaw & Crook, Newcastle.

For Respondent: Mr. H. White, instructed by Mr. D. R. Smith of Dundee.
Cases followed:—

Somtunzi *v.* Sikiti, 1947, N.A.C. (T. & N.) 62.

CASE No. 9 OF 1949.

DHLOZI NGCOBO AND ANOTHER (Appellants) *v.* BIHILDI MDHLALOSE (Respondent).

(N.A.C. Case No. 22/1/49.)

PIETERMARITZBURG: Wednesday, 20th April, 1949: Before Steenkamp, President, Cowan and Schmidt, Members of the Court (North-Eastern Division).

Law of Delicts: *Defamation—publication—privilege—Person in authority as envisaged by Section* 132 *of the Natal Code of Native Law.*

Practice and Procedure: *Misjoinder.*

Held: Enquiry held by an Nduna in connection with a complaint regarding defamation is a privileged occasion.

Held: Publication plays a prominent part in defamation cases.

Held: That defamatory statements made by different persons on different occasions cannot be joined in same summons.

Appeal from the Court of the Native Commissioner, Msinga.

Steenkamp, President, (delivering the judgment of the Court):—

Plaintiff sued the two defendants jointly and severally in the Native Commissioner's Court for £50 damages alleged to have been suffered by him by reason of the wrongful and malicious defamation of himself by the two defendants.

In his summons he sets out that during March, 1947, defendant No. 1 referred to him as " Ungumtakati ngoba uwena lo owabulala umtanami ", and that during June, 1948, Defendant No. 2 repeated the above statement in public and in addition stated " Ungumtakati wabulala izimbongolo zami ".

Plaintiff gave evidence but called no witnesses and from the evidence and from the allegations in the summons, it is clear that the statements of which he complains were made at different times by two different persons, namely the two defendants.

Plaintiff has brought no independent evidence of publication although he states that when defendant No. 2 uttered the words complained of, some of his (defendant's) people were present. Plaintiff reported to the Induna and from the evidence it appears that the

Induna held an enquiry at which were present the plaintiff and both defendants, and at this enquiry it is alleged the defendants admitted and insisted that the plaintiff was an " Mtagati ". If this were so, it seems rather strange that the Induna was not called.

After both defendants had given evidence and closed their cases without calling other evidence, the Native Commissioner gave judgment in favour of plaintiff for £10 and costs against both defendants.

An appeal had been noted to this Court on the following grounds:—

" 1. On the evidence as a whole, the Native Commissioner should have held that the words complained of were not uttered by the defendants, or that there was insufficient proof of utterance by them.

2. Alternatively:—

(*a*) The only evidence of utterance of defamatory words by 1st defendant was plaintiff's evidence as to a statement made to him by 2nd defendant, 1st defendant not being present, and consequently such evidence was not admissable against 1st defendant.

(*b*) As regards 2nd defendant if it be held that he uttered the defamatory words complained of, such utterance occurred during the course of a conversation between plaintiff and 2nd defendant, and there is no evidence that any other person heard the said words and consequently there is no proof of publication thereof.

3. There was a misjoinder of defendants in as much as it is alleged that 1st defendant uttered the defamatory words in March, 1947, and 2nd defendant in June, 1948, and there was no allegation or evidence that defendants were acting in concert.

4. In so far as damage may have been awarded in respect of any utterance and publication at the enquiry held by Nduna Mayoyo Majozi, the Native Commissioner should have held that the occasion was privileged, or alternatively, that plaintiff himself invited the publication of the words complained of, and was consequently not entitled to damages."

The Native Commissioner found proved that 1st defendant did utter defamatory words about plaintiff once to 2nd defendant, and again before the Induna Mayoyo Majozi.

From the record it would appear that the plaintiff was, some time ago, charged for the murder of 2nd defendant's grandson, but he was liberated without trial, and it seems the whole case evolved out of this question in connection with the death of the child. The plaintiff evidently expects people never to refer again to the fact that he was accused of having killed a child. The conversation with defendant No. 2 and against which the plaintiff is complaining now, was not uttered to a person other than to the plaintiff himself. In so far as the alleged statement made by the 1st defendant is concerned, it would appear that the question of privilege arises as Section 132 (2) of the Code clearly provides that no action for defamation will lie if the words used were addressed to any person in authority in good faith and not with express malice.

The plaintiff evidently resented defendant No. 2 mentioning the incident of the death of the child and he then went and complained to the Induna who evidently felt it his duty to enquire into the matter. It can quite easily be understood that the Induna questioned both the defendants and certain statements in reply to these questions were made. An Induna is entitled to hold an enquiry of this nature and therefore we hold that it was a privileged occasion. This was the only occasion at which defendant No. 1 uttered certain words. Defendant No. 1 denied having uttered the words and we therefore only have the bare statement of the plaintiff as to whether defendant No. 1 *did* utter these words. If the words had been uttered, it cannot be understood why the Induna had not been called as a witness for the plaintiff. Publication of defamatory statements plays such a prominent part in cases of damages of this nature, and unless this Court is satisfied that the statement had been published, then the plaintiff has no case.

This Court agrees with paragraph 3 of the notice of appeal that there had been a misjoinder. The allegations in the summons are that 1st defendant uttered the defamatory words on a different occasion than that when defendant No. 2 uttered the words. They did not act in concert and therefore separate actions should have been brought. Paragraph 4 of the notice of appeal has already been dealt with. In regard to paragraph 2, it does not seem quite correct to state that the Native Commissioner relied on alleged utterance of the words that defendant No. 2 had mentioned to him that defendant No. 1 had uttered the words. It would be more correct to state that the Native Commissioner, to a large extent, depended on what defendant No. 1 said before the Induna.

The Native Commissioner has quoted the case of Zungu *v.* Zungu, 1942, N.A.C. (T. & N.) page 4, as an authority to the effect that unless it is a judicial trial, statements made before a Chief are not privileged. The Native Commissioner has overlooked the

fact that in that case the Chief had called a meeting to hear the result of a visit to a witch-doctor. In the present case the enquiry was held by the Induna in connection with a complaint made to him by the plaintiff that the two defendants are defaming him, and therefore we hold that the Induna is a person in authority as envisaged by Section 132 of the Code.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"Absolution from the instance with costs."

For Appellant: Adv. N. James, instructed by Messrs. Nel & Stevens, Greytown.

Respondent: In default.

Laws, Statutes, Ordinances, etc., referred to:—

Section 132(2), Proclamation No. 168 of 1932 (Natal Code of Native Law).

Cases Distinguished:—

Zungu *v.* Zungu, 1942, N.A.C. (T. & N.) 4.

CASE No. 10 OF 1949.

SARAH VILAKAZI duly assisted by ALSON VILAKAZI (Appellant) *v.* DAVID XABA (Respondent).

(N.A.C. Case No. 25/1/49.)

PIETERMARTIZBURG: Thursday, 21st April, 1949: Before Steenkamp, President, Cowan and Schmidt, Members of the Court (North-Eastern Division).

Practice and Procedure—Execution of judgment of Native Commissioner's Court—Section 70 of Magistrate's Court Act.

Held: Defendant knew when he received the cattle that they were being claimed by the palintiff and he is therefore debarred from stating that he derived good title.

Appeal from the Court of the Native Commissioner, New Hanover.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff, a Native woman duly assisted by her guardian Alson Vilakazi, sued the defendant for the return to her of five head of cattle or their value £10 each. A verbal plea was lodged and this reads as follows:—

> "That the cattle were attached by the Messenger of Court, New Hanover, under writ of Attachment in Case No. 48/1947 where the plaintiff was David Xaba and the defendant Hendry Xaba—Present defendant was the Judgment Creditor in that case—2nd. The cattle are not in the defendant's possession—they have been sold by him for the sum of £25 prior to the issue of the Summons in this matter—3rd: The defendant denies that the cattle were of the value of £10 each."

The Native Commissioner granted an absolution judgment and against this judgment an appeal had been noted to this Court on the grounds that on the facts as found by him, the Native Commissioner should have held that in law plaintiff is entitled to vindicate her property or alternatively recover the value thereof from defendant.

It appears from the record that the present defendant obtained a judgment against Hendry Xaba for seven head of cattle or their value £5 each and the sum of £3 and costs. In that case the claim was for £50 cash, but the defendant, Hendry Xaba, pleaded that he was indebted in seven head of cattle and £3. This plea was accepted, hence the judgment granted in that case.

In pursuance of that judgment a Warrant of Execution was issued on form U.D.J. 157. The judgment debt is given as seven head of cattle or their value £35: interest £3 and costs are also mentioned in the writ.

It will therefore be observed that the judgment and the writ were not for specific head of cattle but merely for seven head of cattle. It is important to mention this at this stage, as will be seen later on.

On the 17th February, 1948, the Messenger of Court, armed with the writ, attached six head of cattle alleged to have been found in the possession of one Sheti Vilakazi. There appears an endorsement on the writ by the Messenger of Court and this endorsement reads as follows:—

> "I certify that on the 16th day of April, 1948, after instructions from plaintiff's Attorney, I moved the said six head of cattle and handed over to plaintiff (i.e. present defendant) five head of cattle. One beast is in my possession to be sold to cover costs."

As an exhibit—" D "—in the record there appears a letter dated the 24th April, 1948, from Messrs. Nel & Stevens, Attorneys, addressed to the Messenger of the Court, New Hanover. This letter was written on behalf of Sarah Vilakazi, the present plaintiff, in which she claims that the six head of cattle attached the previous week are her property. Prior to this letter, Alson Vilakazi, the son of the plaintiff complained to the Magistrate at New Hanover. This complaint reads as follows:—

> " Six head of cattle have been attached by the Messenger of the Court from my stock to satisfy the judgment of Court against Hendry Xaba Case No. 48/47. I have paid lobolo to Hendry Xaba (nine head of cattle) and I do not know why my stock should be attached for Hendry's delicts. I want my cattle back and I ask the authorities to assist me to get my cattle back."

A copy of this complaint was forwarded to Messrs. Stewart, Smith & Howard, Attorneys for the Judgment Creditor in the original case, namely, the present defendant.

In the present appeal the Native Commissioner found that plaintiff proved her claim that the cattle which were attached by the Messenger of Court belonged to her, but he goes on and states that as the cattle had been handed over to the defendant by the Messenger of Court in terms of the Writ of Execution, he held that such handing over could not be impeached.

Section 70 of the Magistrate's Court Act which is applicable to a Native Commissioner's Court reads to the effect that a sale in execution by the Messenger shall not, in the case of movable property, after delivery thereof, be liable to be impeached as against a purchaser in good faith and without notice of any defect.

In the present appeal the defendant, who was the Judgment Creditor in the previous case, knew that when the Messenger handed those cattle over to him—they were not the property of the Judgment Debtor but that they are being claimed by the plaintiff. It is true, no interpleader action was instituted by the present plaintiff but that still does not prevent her from vindicating her right in the property in whoever's possession they might be. The only exception is that if the property had been sold by the Messenger of the Court and the purchaser did not know of any defect in title, as provided for in Section 70 quoted above.

The original judgment was not for specific head of cattle and therefore I am of opinion that the Messenger of Court should have sold the cattle he attached and paid the proceeds over to the Judgment Creditor. It was held in this Court in the case of Pakati *v.* Nxumalo, 1947, N.A.C. (T. & N.), 113, that the handing over of cattle attached as the result of a Chief's judgment gives the person to whom they are handed over good title and any other person purchasing them thereafter derives similar title.

A distinction must be drawn between that case and this one. No provision is made for the sale of stock from a Chief's Court judgment, whereas judgments from a Native Commissioner's Court are subject to Section 70 of the Magistrate's Court Act quoted above.

The defendant knew when he received those cattle that they were being claimed by the plaintiff and he is therefore debarred from stating that he derived good title—even applying Section 70 of the Magistrate's Court Act to this Case. He was not an innocent purchaser and he is therefore liable to the plaintiff.

Counsel for the respondent intimated to this Court that he cannot advance any argument in favour of the judgment.

The appeal is allowed with costs.

There is the value of the cattle which plaintiff places at £10 each. They might be worth that, but we will have to accept the figures given by the defendant as to the value of the cattle. He states the value is £43. This figure is accepted by both Counsels.

The judgment of the Native Commissioner is therefore altered to read:—

> " For plaintiff for five head of cattle or their value £43, with costs."

For Appellant: Adv. N. James, instructed by Messrs. Nel & Stevens, Greytown.

For Respondent: Adv. J. H. Niehaus, instructed by Messrs. Stewart, Smith & Howard, New Hanover.

Statutes etc., referred to:—

Section 70 of Act No. 32 of 1944.

Cases distinguished:—

Pakati *v.* Nxumalo, 1947, N.A.C. (T. & N.), 113.

CASE No. 11 OF 1949.

MBANGAMBI MBATA (Appellant) *v.* MBANGO ZUNGU (Respondent).

(N.A.C. Case No. 43/1/49.)

PIETERMARITZBURG: Thursday, 21st April, 1949: Before Steenkamp, President, Cowan and Schmidt, Members of the Court (North-Eastern Division).

Native Law and Custom—Maintenance (Isondhlo).

Practice and Procedure—Tender and costs of suit.

Held: In pure Native Law and Custom the amount of " Isondhlo " payable is one beast in respect of each person, irrespective of the period of maintenance.

Held: Plea of tender has force only if made to the plaintiff personally or his legal representative, and has no effect on the costs of the action, if not so made.

Appeal from the Court of the Native Commissioner, Weenen.

Cowan, Member of Court (delivering the judgment of the Court):—

In this case the plaintiff (respondent) claimed from the defendant (appellant) twenty head of cattle (or their value £100) as maintenance for the latter's ward, Mgegi, and her two daughters over a period of twenty years. In his plea the defendant denied that the plaintiff had any legal claim and went on to state that he had already tendered three beasts to the plaintiff.

The Native Commissioner found that the plaintiff had maintained Mgegi and her daughters for a period of from 12 to 15 years and gave judgment in his favour for six head of cattle or their value £30 with costs, i.e. two head in respect of each person.

Against this judgment the defendant has appealed on the following grounds:—

1. That the judgment is against the weight of evidence, contrary to law and not in accord with real and substantial justice.

2. That the plaintiff failed to prove a right to his claim, has no cession of action from Gudu Zungu, his father, and refused to surrender the defendants' wards.

3. That the amount awarded is—

(*a*) Unlawful if it includes Gudu Zungu's right of action and

(*b*) more than the Native Law permits under any circumstances.

4. That if plaintiff is entitled to claim, the amount tendered was ample.

In his address appellant's Counsel intimated that he was not pressing either Nos. 1 or 2 of the grounds of appeal and that he would be satisfied if the judgment of the lower Court was reduced to three head of cattle. He contended, however, that as during the hearing of the case the defendant had agreed that he was liable for maintenance and had agreed to pay three head of cattle, the plaintiff should only have been awarded costs up to that stage.

In the case of Cele *v.* Cele, 1947, N.A.C. (N. & T.) at page 3, it was laid down that "isondhlo " is pure Native Law and Custom, that it is not payment for moneys etc. disbursed but a gift and reward for the successful rearing of wards. In pure Native law and custom the amount of " isondhlo " payable is one beast in respect of each person irrespective of the period of maintenance, and the Native Commissioner erred in awarding two head. To this extent the appeal must succeed.

As regards the question of costs, it is clear that although the defendant agreed to pay three head of cattle, he at no stage agreed to pay these *to the plaintiff*. In fact he contended throughout the trial that any " isondhlo " due was payable not to the plaintiff but to his father as it was at the kraal of the latter that the girls were maintained. This was indeed the case but the record discloses that the plaintiff lives at his father's kraal; that it was he who supported the girls; that his father is old and blind; that he has in fact taken over the kraal and that in bringing the action he acted with the concurrence of his father. In the circumstances the Native Commissioner was correct in finding that the plaintiff was the right person to bring the action and he is entitled to his costs in the ordinary way.

The appeal will accordingly be allowed in part and the judgment of the Native Commissioner is altered to read:—

" For plaintiff for three head of cattle or their value £15, with costs ".

As the appellant has been substantially successful in this Court he is entitled to the costs of the appeal.

For Appellant: Mr. J. C. van Rensburg of Messrs. Hellet & de Waal, Estcourt.

For Respondent: Mr. L. Weinberg of Messrs. Nathan & Co., Pietermaritzburg.

Cases referred to:—

Cele *v.* Cele, 1947, N.A.C. (T. & N.) 3.

CASE No. 12 OF 1949.

MNDANI DHLADHLA AND OTHERS (Appellants) *v.* VELA LINDA (Respondent).

(N.A.C. Case No. 22/3/49.)

PIETERMARITZBURG: Wednesday, 20th April, 1949: Before Steenkamp, President, Cowan and Schmidt, Members of the Court (North-Eastern Division).

Practice and Procedure—Condonation of late noting of appeal—Onus of proof of assault.

Damages—Illegal assault—Damages for loss of leg.

Held: Ignorance of rules cannot be accepted as a valid excuse.

Held: That where a manifest injustice has been done, late noting of appeal will be condoned.

Held: There is an onus on plaintiff to satisfy the Court that the injury he received was inflicted by defendant or defendants, or that others acted in concert with the first defendant, and that it was a result of an assault and not of an affray.

Appeal from the Court of the Native Commissioner, Msinga.

Steenkamp, President, (delivering the judgment of the Court):—

Judgment in this case was entered on the 20th July, 1948. On the 16th November, 1948, the appellants filed an affidavit with the Clerk of the Court in support of an application for the condonation of the late noting of the appeal. The last paragraph of this affidavit reads:—

> " Wherefore I humbly pray that the above Honourable Court may be pleased to grant an Order in terms of the Order prayed annexed hereto."

We find that no application is actually attached as mentioned in the last paragraph above.

Notwithstanding the filing of this affidavit it is observed that the notice of appeal is only dated the 11th December, 1948, and it is not understood why the Attorneys delayed in actually noting the appeal from the 16th November until the 11th December. Such dilatoriness cannot be too strongly deprecated.

Before dealing with the application, this Court is constrained to remark that although the notice of appeal was actually received by the Clerk of the Court on the 17th December, 1948, the Registrar of this Court was not notified until the 13th January, 1949. Attention is invited to Rule 16(1) of the Native Appeal Court Rules in which it is specifically stated that the Clerk of the Court must *immediately* he receives a notice of appeal, notify the Registrar. It is observed from other records from the same centre that the Clerk of the Court at Msinga is most dilatory in complying with the rules of the Court and with circular instructions, and this Court wishes once more to impress that rules are not made to be treated with impunity by officials of a Court of Law. Neglect of duty leads to extra correspondence and the staff of this Court is burdened with unnecessary work which could so easily be prevented if more attention is paid by Clerks of the Court to their duties.

In the affidavit for condonation for the late noting of the appeal the appellants give an explanation for the delay in that they state they notified the judicial officer after he gave judgment, that they were appealing. It was late in the afternoon and at that time all the other officials had already departed from the office and when they went round to the presiding officer's office, he had already left for the day, but they were under the impression that in informing the judicial officer that they intended appealing, the next move had to come from the Court, advising them as to when the appeal would be heard. It is difficult for this Court to accept such an explanation, as the rules are clear that an appeal should be lodged with the Clerk of the Court. It was the duty of the appellants to have called on the Clerk of the Court the following morning to lodge their appeal. Ignorance of the rules cannot be accepted as a valid excuse. See Lekhetha *v.* Tsane, 1946, N.A.C. (C.O.) 22.

Ex facie the record there appears some substance in the contention by Counsel that a manifest injustice has been done, and following its usual practice this Court condoned the late noting of the appeal.

Dealing with the appeal itself, the plaintiff claimed from the six defendants the sum of £500 as damages for loss of one leg, pain and suffering. The Assistant Native Commissioner entered judgment for plaintiff for £300 and costs against all six defendants. Against this judgment an appeal has been noted on the ground which may be summarised as the judgment being against the weight of evidence and against the quantum of damages awarded.

The Plaintiff gave evidence and called only one witness to testify as to what occurred one evening when it was dark outside a hut. The plaintiff and his witness gave evidence in conflict with what the six defendants testified. There is an onus on the plaintiff to satisfy the Court that the injury he received was inflicted by defendant No. 1 and that the other five defendants acted in concert with the first defendant. It is not disputed that the plaintiff

received an injury to the knee which necessitated the amputation of his leg. The question, however, arises as to who threw that stone at the plaintiff. Defendant No. 1 denies that he did so. Plaintiff admits that defendant No. 6 informed the other defendants not to assault the plaintiff after he fell to the ground as a result of the injury he received from the stone having been thrown at him. One would expect that at a brawl of this nature there would be available independent persons who can testify as to whether it was an assault or whether it was a fight between two factions, but the plaintiff only called his brother.

There is evidence on the record that the defendant No. 1 was criminally charged but he was aquitted. This, however, does not debar the plaintiff from instituting a civil action, but the civil court will also require satisfactory proof that the injury plaintiff received was at the hands of the defendants and that it was an assault and not an affray. There are numerous indications in the record that it was an affray.

Plaintiff wants the Court to believe that he was absolutely blameless and that he walked out of the hut and a stone was thrown at him. He, however, admits that he had four companions but that they left the hut before him. By this he probably means that they left the hut in single file and that he was the last to exit. It is noted that not one of the four companions was called as a witness. It is also significant that plaintiff's brother who was called as a witness was not called at the Criminal trial, nor does plaintiff in his evidence state that his brother was present. He gives the names of his four companions and states there were five of them but his brother's name is not mentioned. Counsel for defendant suggested that plaintiff's brother, Mtagati Linda, might also be known as Mnukeni—one of the four companions, but this Court cannot make such an assumption in the absence of evidence to that effect.

Defendant No. 6 talks of a fight having taken place, and from the evidence it is not possible to state definitely without any doubt, whether it was a fight or an assault. If plaintiff took part in the fight, then he acted *in pari delicto* and will probably not be able to recover damages.

Plaintiff states that he was also assaulted with sticks after he fell to the ground as a result of being hit by a stone, but he bases his claim entirely on the injury to the leg and the pain and suffering. It is admitted by both plaintiff and his brother that it was dark, but they say they were able to see defendant No. 1 pick up a stone and throw it at plaintiff, but in a melee of this nature, it would be most difficult to identify one particular person who is responsible for the throwing of a stone.

There should have been a doubt in the mind of the Assitant Native Commissioner as to—firstly who caused the injury and secondly, whether it was a fight or an assault. It is unfortunate for the plaintiff that he lost a leg and one can only express sympathy with him, but at the same time the judgment of this Court cannot be swayed by any sentiment. As remarked before, the Court must be satisfied that that injury was caused by defendant No. 1 and that the others acted in concert with him in assaulting the plaintiff.

In view of this finding it is not necessary to deal with the quantum of damages except that the Native Commissioner would appear to have been over-liberal.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"Absolution from instance with costs."

For Appellant: Adv. W. G. M. Seymour, instructed by Messrs. van Rooyen & Foorder, Greytown.

For Respondent: Adv. O. A. Croft-Lever, instructed by Messrs. Nel & Stevens, Greytown.

Cases referred to:—

Lekhetna *v.* Tsane, 1946, N.A.C. (C.O.) 22.

CASE No. 13 OF 1949.

ELDA MNGUNI (Appellant) *v.* MERICA MABASO (Respondent).

(N.A.C. Case No. 8/2/49.)

PIETERMARITZBURG: Friday, 22nd April, 1949: Before Steenkamp, President, Cowan and Schmidt, Members of the Court (North-Eastern Division).

Mercantile Law—Pledge—Capacity of wife to contract—Consent of husband.

Held: That a pledge made by a wife must be ratified by her husband before it has any legal effect.

Appeal from the Court of the Native Commissioner, Estcourt.

Cowan, Member of Court (delivering the judgment of the Court):—

In this case the plaintiff, Merica Mabaso (respondent) brought an action in a Chief's Court against Elda Mnguni (appellant), duly assisted by her husband, Bekupiwa Mnguni, for the return of a beast which she alleged had been unlawfully taken by the defendant. The Chief found in favour of the plaintiff and his judgment was confirmed by the Native Commissioner.

The defendant's plea in the Native Commissioner's Court was that the plaintiff and her husband both agreed that the beast should remain in the defendant's possession as a pledge until money owing by the plaintiff's husband to the defendant was repaid and that this money had not been repaid and the defendant was accordingly entitled to retain the beast as a pledge.

It appears from the record that on a Monday in March, 1948, a Native arrived at the kraal of Mabaso and started a " get rich quick " bank. On the Tuesday and without the knowledge of her husband, Elda invested £5. 12s. 6d. belonging to him in the bank. She says that at midday on that day the banker was prepared to repay her deposit but was prevented from doing so by Johannes who told the investors to leave and said he had the keys and money and would pay them the next day. She says that the next day he said that the others had run off with the money and that the plaintiff then produced the cow and said that she was paying it for Johannes. She went on to say that when she took the cow home her husband said he did not want the cow but wanted his money.

Merica's story is that the beast was taken without her consent and that Johannes was not at home at the time.

The Native Commissioner found the following facts proved:—

1. That during March or April, 1948, plaintiff's husband's kraal was visited by certain Natives commonly called Native " Bankers ", who took deposits of money from other Natives, promising them refund of their deposits together with interest at an enormous rate.
3. Plaintiff's husband allowed these bankers to conduct their business in a building on his plot.
3. Defendant, who is a married woman and therefore a minor, deposited the sum of £5. 12s. 6d. with the " bankers " after having been promised that she would be repaid the sum of £10 in return.
4. The Bankers failed to keep their promise and defendant lost her deposit together with other Natives.
5. These Natives became cross and disturbances broke out at the kraal.
6. Plaintiff's husband left the kraal when the disturbances occurred.
7. During the disturbances plaintiff who is also a married Native woman, and consequently a minor, pledged a certain beast in security for the payment of the money deposited to protect her husband from whom some depositors demanded it.
8. Later this beast was taken by defendant to her husband's kraal.
9. No efforts were made by plaintiff to prevent defendant from taking the beast.
10. The money deposited by defendant has not yet been refunded to her.
11. Plaintiff's husband was not liable for the debts contracted by the Bankers.

He held, however, on the authority of Kilburn *v.* Kilburn's Estate, 1931, A.D. 506, that he could not enter judgment for defendant because Johannes was not liable for the amount the Banker owed the defendant and that the beast was consequently pledged to secure an obligation which did not exist between the contracting parties.

In this Court appellant's Counsel contended that Johannes had so identified himself with the bankers as to justify him being regarded as a principal or, alternatively, that the circumstances indicated an undertaking on his part that he would be responsible. He contended further that the security was, in any event, not restricted to a debt due by Johannes but that it was in fact a general security for the repayment of the money deposited no matter who might be the principal debtor liable to repay such deposit.

The respondent's Counsel accepted the Native Commissioner's finding that the cow had been pledged by the plaintiff but he argued that as both the women were minors (in terms of the Code) neither of them had sufficient legal capacity to make a contract alone, but that both had acted without the assistance of their guardians and that the alleged pledge was therefore not a valid one.

This Court feels constrained to remark that on the evidence it appears extremely doubtful whether a pledge was made at all and that the evidence and probabilities point to the beast having in fact been spoliated. But be that as it may and, assuming that the beast was pledged by the plaintiff, it is satisfied on the evidence that any such pledge was made in the absence of the plaintiff's husband and without his knowledge or consent. The plaintiff

endeavoured to establish that after the beast had been removed, Johannes has sent several messages to her husband saying that he would pay him the amount of £5. 12s. 6d. and asking himnot to sell the beast and the argument was advanced that this amounted to a ratification by Johannes of his wife's action in pledging the beast. That any such messages were ever sent was strenuously denied by both Johannes. the plaintiff and another witness (their daughter) and on the evidence before it this Court is not prepared to find that any messages were ever sent and it must hold that the pledge was never ratified by Johannes.

These findings dispose of the case and it is therefore unneccessary to decide whether or not the defendant could legally have accepted the beast as a pledge without her husband's assistance or to deal with the points raised by appellant's Counsel.

The judgment given by the Native Commissioner (although for different reasons) was the correct one and the appeal will accordingly be dismissed with costs.

For Appellant: Adv. Croft-Lever, instructed by Messrs. Jerome & Reitz, Estcourt.

For Respondent: Mr. J. C. van Rensburg of Messrs. Hellett & de Waal. Estcourt.

CASE No. 14 OF 1949.

MPENDU NGCOBO (Applicant/Appellant) *v.* MAPANGA PEWA (Respondent).

(N.A.C. Case No. 33/1/49.)

DURBAN: Monday, 2nd May, 1949: Before Steenkamp, President, Martin and Ashton, Members of the Court (North-Eastern Division).

Practice and Procedure—Application for condonation of late noting of appeal—Lack of funds—Illness—ignorance of time limit.

Held: Lack of funds is not a sufficient excuse for condonation of the late noting fo appeal.

Held: Illness in itself cannot be accepted as a valid excuse for condonation of late noting of appeal, unless corroborated by external evidence.

Held: This Court is not prepared to ignore the time limit as fixed by the Rules unless the applicant has *ex facie* the record a good chance to succeed on appeal.

Appeal from the Court of the Native Commissioner, Pinetown.

Steenkamp, President (delivering the judgment of the Court):—

This is an application for the condonation of the late noting of an appeal.

Judgment was delivered on the 4th February, 1949, and an appeal noted on the 4th March, 1949. The reasons for the delay are given—firstly that the appellant was unable to raise the required amount for security for costs; secondly that he became ill, and thirdly that he was not aware that there was a special time limit in which notice of appeal should be given.

In the case of Mapumulo *v.* Mapumulo, 1940, N.A.C. (T. & N.), 132, it was held that lack of funds is not sufficient excuse. Also in the case of Mkize *v.* Mkize, 1942 N.A.C. (T. & N.), 7, the excuse was given for the delay that applicant was unable to find the sum of £5 required to be deposited as security for costs. In that case the Court found itself unable to accept the excuse.

The second ground is disposed of by virtue of the case of Dube *v.* Ngema, 1941, N.A.C. (T. & N.), 42, and also in the case of Mhlongo *v.* Mhlongo, 1946, N.A.C. (T. & N.), 59. The applications were not supported by any medical certificate or corroborative evidence and the Court held that illness in itself, not corroborated by any external evidence, cannot be accepted as a valid excuse.

In connection with the third reason, this Court wishes to point out that a time limit is fixed by the Rules and this Court is not prepared to ignore the period unless the applicant has *ex facie* the record a good chance to succeed on appeal.

Turning to the merits of the case, the appellant in the Court below claimed that a girl by the name of Nobelungu is his child. The Native Commissioner found proved that this girl was born as a result of her mother cohabiting with a man by the name of Shalidana, by whom she had another child by the name of Dingekile.

Applicant in the Chief's Court claimed the property rights in both these girls, but on appeal to the Native Commissioner's Court he abandoned the claim in respect of Dingekile. The Native Commissioner, who is an experienced officer, has fully gone into the merits of

the case and in well-prepared reasons he has found that the girl Nobelungu is not the natural daughter of the appellant. **This Court agrees with that judgment and no good purpose would be served by condoning the late noting of the appeal.**

The application is accordingly dismissed with costs.

For Applicant/Appellant: Mr. T. J. D'Alton, Durban.

Respondent: In default.

Cases referred to:—

Mapumulo *v.* Mapumulo, 1940, N.A.C. (T. & N.) 132.

Mkize *v.* Mkize, 1942, N.A.C. (T. & N.) 7.

Dube *v.* Ngema, 1941, N.A.C. (T. & N.) 42.

Mhlongo *v.* Mhlongo; 1946, N.A.C. (T. & N.) 59.

CASE No. 15 OF 1949.

MANZOLWANDHLE NGEMA (Appellant) *v.* MASOKINGI MFEKA (Respondent).

(N.A.C. Case No. 21/49.)

DURBAN: Monday, 2nd May, 1949: Before Steenkamp, President, Martin and Ashton, Members of the Court (North-Eastern Division).

Delicts—Defamation—Privilege—Native Chiefs acting in administrative capacity.

Held: The words used by the defendant, a Native Chief, were relevant to the enquiry he was holding in his quasi-judicial capacity which afforded him a qualified privilege.

Appeal from the Court of the Native Commissioner, Mapumulo.

Steenkamp, President (delivering the judgment of the Court):—

The facts of the case are that the defendant, a Chief in the Mapumulo district, was called upon to settle a boundary dispute between the plaintiff and his brother, Tofi. Wattle trees apparently grew on their respective lands and from the record it would appear that Tofi complained that the plaintiff was cutting down trees on his (Tofi's) land and selling the wattle bark.

The defendant investigated the complaint and gave his finding to the effect that plaintiff had stolen Tofi's wattle plantation and further said plaintiff was a thief.

These words can be toned down to mean that the plaintiff had encroached on Tofi's ground and must therefore give up the ill-gotten gains derived as a result of having cut down trees which the Chief (defendant) found were growing on Tofi's lands.

The words used by the defendant, it is conceded by this Court, are couched in strong language, but can it be said he uttered the words with *animus injuriandi*.

According to Section 3 (3) of Proclamation No. 123 of 1931 as amended by Proclamation No. 234 of 1938, a Chief is empowered to investigate and settle administratively disputes in connection with the occupation of allotments. He was therefore entitled to give a decision which, even couched in extravagant language, can mean no more than that he found the plaintiff's action in taking his brother's wattles, tantamount to theft.

The Native Commissioner gave judgment for plaintiff for £10 and costs, and against this judgment an appeal has been noted. The defendant was unrepresented in the Court below and therefore it was not necessary to give grounds of appeal, but subsequently the following grounds were filed:—

(1) On the evidence as a whole the Native Commissioner should have held that in using the words complained of, defendant did not intend to imply that plaintiff was a thief, but that plaintiff had illegally occupied the property of his brother.

(2) In any event the said words were spoken on a privileged occasion, as at the time defendant was acting as a judicial or administrative officer engaged in settling a dispute concerning the land, and there was no proof that in uttering the words complained of he was actuated by express malice.

Additional grounds which read as follows were filed later:—

(*a*) The Native Commissioner erred in the following respects:—

He allowed evidence to be led as to the meaning of the words which formed the subject of the action notwithstanding the fact that the words, if proved, were *per se* defamatory.

(*b*) He admitted hearsay evidence to explain the reason for the absence of Induna Ndayi Mapumulo, and relied on such evidence in giving judgment.

The defendant in his evidence denies that he used the words attributed to him by the plaintiff. All defendant states is that when he investigated the matter he came to the conclusion that Tofi was correct and that the plaintiff went over the boundary to cut Tofi's wattles. The Native Commissioner has found as a fact that defendant accused plaintiff of having stolen his brother's wattle plantation and sold the bark.

This Court finds no quarrel with this finding by the Native Commissioner, but as the Chief acted in his administrative capacity, he was entitled to give such a finding which must have been based on evidence or statements made to him.

The words used by the defendant were relevant to the enquiry he was holding in his quasi-judicial capacity which afforded him a qualified privilege.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

" For defendant with costs."

For Appellant: Adv. A. B. Harcourt, Durban.

For Respondent: Mr. N. R. F. Steven, Stanger.

Statutes, Proclamations, etc., referred to:—

Section 3 (3): Proclamation No. 123 of 1931, as amended by Proclamation No. 234 of 1938.

CASE No. 16 OF 1949.

LYNTJIES NKAMBULA (Applicant/Appellant) *v.* GODFREY LINDA (Respondent).
(N.A.C. Case No. 76/1/48.)

PRETORIA: Monday, the 13th June, 1949: Before Steenkamp, President, Tweedie and Liefeldt, Members of the Court, (North-Eastern Division).

Practice and Procedure—Application for leave to appeal to the Appellate Division.

Held: In view of the importance of the matter to the Native public, permission is granted to appeal to the Appellate Division on the following points:—

> Whether or not a man who is a partner to a customary union and subsequently contracts a civil marriage with another woman during the subsistence of the customary union can be regarded by this act as having deserted his customary union wife, and whether under these circumstances the woman to the customary union is justified in leaving her husband without her guardian becoming liable for a refund of the lobola.

Appeal from the Court of the Native Commissioner, Ermelo.

Steenkamp, President, (delivering the judgment of the Court):—

The plaintiff and defendant's daughter, Lena, entered into a Native customary union, and ten head of cattle were paid as lobola. They apparently lived together as man and wife for some time when the plaintiff entered into a civil marriage with Belina Bongo on the 23rd October, 1946.

The woman Lena thereafter left the plaintiff, whereupon plaintiff claimed that she had dissolved the customary union and he is now entitled to a refund of the lobola he had paid for her.

According to Native law and custom, if the husband is the innocent party he is entitled to such a refund, whereas if he is the guilty person, he forfeits the lobola.

The Native Commissioner who tried the case entered the following judgment:—

> " The woman defendant (Lena) to return within one month or defendant to return lobola as prayed with costs and marriage cancelled."

The defendant noted an appeal to this Court which dismissed the appeal but corrected the judgment to read:—

> " The defendant is ordered to return his daughter, Lena, to the plaintiff within one month, failing which he must refund the ten head of cattle paid as lobola, or their value £30, with costs. Failing return of Lena to her husband as ordered, the customary union is dissolved."

The Native Appeal Court, as then composed of the Acting President and two members gave a written judgment which is attached hereto.

Application is now made in terms of Section 18(1) of the Native Administration Act, No. 38 of 1927, for leave to appeal to the Appellate Division of the Supreme Court.

In view of the importance of the matter to the Native public, permission is granted to appeal on the following points:—

> Whether or not a man who is a partner to a customary union and subsequently contracts a civil marriage with another woman during the subsistence of the customary union can be regarded by this act as having deserted his customary union wife, and whether under these circumstances the woman to the customary union is justified in leaving her husband without her guardian becoming liable for a refund of the lobola.

Counsel for applicant (defendant in the Court below) has intimated to this Court that the appeal to the Appellate Division if permission is granted—will be undertaken *pro deo*. In the circumstances the costs for the respondent should also not be too high and this Court is of opinion that a deposit of £20 will suffice, and it is accordingly ordered that this amount be deposited as security for costs or other security be given.

Ramsay, Acting President, (delivering the judgment of the Court):—

In this case the plaintiff states that he married Lena, daughter of defendant, by Native custom; that she deserted him and that Plaintiff claims the return of his lobola and cancellation of the union.

A summons in such case must claim return of the deserting wife, *failing which* the return of the lobola and the cancellation of the union. This deficiency in the summons was rightly corrected by amendment.

The notes recorded by the Native Commissioner are confusing as he refers to Lena variously as the " woman defendant " and " defendant ". Lena is not a party to the case and so is not a defendant.

Defendant's plea is:—

> " Plaintiff is not entitled to his claim. Defendant has not deserted. Plaintiff is married subsequently to another woman by Christian rites. I produce marriage certificate. Plaintiff is therefore not entitled to return of lobola."

Therafter the notes made by the Native Commissioner go on to say:—

> " Mr. Pienaar and Mr. de Villiers agree to the facts of the case as stated that plaintiff was married to another woman by Christian rites and agree that case be decided on those facts. No evidence is called."

These " facts " agreed upon do not indicate whether the Attorneys agreed or not that Lena had deserted her husband. The summons alleges she did, but the plea claims she did not.

In his reason for judgment, the Native Commissioner writes:—

> " No evidence was led. Plaintiff and defendant admitted the facts as follows and asked for judgment thereon: ' Plaintiff married defendant by Native custom as stated. Plaintiff subsequently married defendant, another woman, by Christian rites. Defendant deserted plaintiff; made demand for her return: She did not return: Plaintiff now demands return of lobola '."

These "reasons " are incomprehensible. Plaintiff could not have married defendant, who is a man. " Plaintiff subsequently married defendant another woman by Christain rites " simply does not make sense. The " facts " agreed upon by the Attorneys do not include the desertion of the woman Lena. Later in his reasons, the Native Commissioner states that " her desertion is not denied ", but the plea specifically does deny desertion.

The Native Commissioner has, accordingly, given judgment on a finding unsupported by evidence and not admitted by the defendant.

Counsel before this Court, however, agreed that it had been made clear in the Native Commissioner's Court that Lena had left her husband. The Native Commissioner's notes ascribe to Mr. Attorney de Villiers the statement in the Court below that Lena deserted in October, 1927. It was agreed before this Court that this is an error and that the date of desertion was October, 1947, a year after the plaintiff married another woman by civil rites.

It was agreed by Counsel that the point to be decided by this Court, irrespective of the shortcomings of the record, was whether a woman, married to a man by Native custom, was entitled to or justified in leaving her husband when the latter contracted a subsequent marriage under the common law. To save the costs involved in sending the case back to the lower Court to have the deficiencies in the proceedings corrected at a further hearing, this Court accepts the position as presented by Counsel before it.

Counsel for appellant (defendant) very ably pleaded that Lena was entitled to leave her husband when he married another woman under common law. He argued that respondent, by contracting a civil marriage, had abandoned Native law in this respect and

so lost his rights in Lena, who, by such subsequent marriage, was placed in the position of leading an adulterous life with her Native-custom husband. The civil marriage wife could at any time sue her husband for divorce on the ground that he was living in adultery with Lena. The whole position was *contra bonos mores.* Lena was being forced into the impossible position of being a possible co-respondent as the civil marriage implies exclusive cohabitation between one man and one woman. She was also placed in an untenable position as, despite the fact that by Native law, she was the Great Wife, the second woman, by virtue of the civil marriage, had greater rights than she. The Court's order that she return to this adulterous union was immoral and cannot stand.

If the position of Lena is untenable, so is that of her father, the appellant. As Lena was justified in refusing to live under the conditions described, so her father could not be ordered to return the lobola as Lena had done no wrong in leaving the respondent. Thus argued Counsel for the appellant.

There are no children of the union between Lena and the respondent.

This case is an interesting example of a conflict between Common and Native law.

Statute law does not forbid the marriage of a man by civil rights while a Native custom marriage exists between him and another woman. Section 22(1) of Act No. 38 of 1927, states:—

> " No male Native shall, during the subsistence of any customary union between him and any woman, contract a marriage, with any other woman, *unless* he has first declared upon oath the name of such first-mentioned woman. . . "

Sub-section (7) reads:—

> " No marriage contracted after the commencement of this Act during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof . . . "

It is argued that the word " material " used in the foregoing paragraph refers only to property or inheritance rights, but, under Native law, a wife can own no property, so the word cannot be construed in this restricted sense. The Concise Oxford Dictionary defines " material " as " concerned with the matter, not the form, of reasoning;. . . unspiritual; concerned with bodily comfort; important; essential . . ." There is no mention of its referring to property or worldly goods. In the absence of any specific meaning assigned to the word, this Court must be bound by the ordinary accepted meaning thereof.

Her material rights include her right of co-habitation with her husband and her right to live with and be supported by him.

Section 11 of Act No. 38 of 1927 gives discretion to Native Commissioner's Courts to apply Common or Native law to suits between Native and Native, and contains the proviso that it shall not be lawful for any court to declare that the custom of lobola . . . is repugnant to the principles of public policy or natural justice—in other words, *bonos mores.*

To apply these points to the present case: Lena married respondent by lobola (Native) custom, which recognises the right of her husband to contract marriage unions with other women. The fact that he married another woman subsequently under Common law does not in any way affect Lena's rights or privileges which are specially protected as stated above.

Being a tribally minded individual (vide her marriage by Native custom) it cannot matter to her morally under what conditions her husband contracted the second marriage—he has merely acquired a second wife. Such second marriage cannot affect her in the least merely because it was not a customary union.

If Lena was legally and morally living and co-habiting with her husband prior to his second marriage, such mode of living cannot suddenly become immoral through no action of hers, and merely because of a state of affairs over which she had no control.

Of course, Lena, as an adult human being, entitled to the rights of any individual, is at liberty to refuse to live under such conditions and to leave her husband, but then Native custom must inexorably operate: her guardian must return the lobola paid for her. The number of cattle paid as lobola is not challenged.

The Native Commissioner's attention is invited to paragraphs 31 and 33 of Justice Consolidated Circular " Appeals and Reviews ", and paragraph 11 of Native Affairs Department General Circular No. 24 of 1938, with the request that he ensure that his Clerk of the Court observe these instructions in future.

The appeal is dismissed, but the judgment of the Court below is corrected to read:—

> " The defendant is ordered to return his daughter Lena to the plaintiff within one month, failing which he must refund the ten head of cattle paid as lobola, or their value £30, with costs. Failing return of Lena to her husband as ordered, the customary union is dissolved."

In view of this appeal, the one month mentioned will date from today.

I. C. H. O. Holtzhausen, Member:—

I concur with the remarks made by the Acting President.

Native customary union is dissolved by the return of the " lobola " or bogadi ".

In this case it would appear that Lena lived with respondent for about a year subsequent to his marriage with another woman by civil rites, it must therefore be presumed that her moral susceptibilities were in no way affected. She is still the customary wife of defendant, and any children she may have with another man will be the children of defendant and have his " Isibongo " (surname). Respondent would be able to sue such a man for damages for adultery, until such time as the customary union is dissolved by the return of the lobola.

For Applicant/Appellant: Adv. Badenhorst, instructed by Messrs. Roux & Jacobsz of Pretoria.

Respondent: In default.

Statutes, etc. referred to: Act 38 of 1927, secs. 11, 18 (i), 22 (i).

CASE No. 17 OF 1949.

KAZAMULA MALUNGANE (Applicant/Appellant) *v.* **JOHN KHOZA (Respondent).**
(N.A.C. Case No. 58/1/49.)

PRETORIA: Monday the 13th June, 1949: Before Steenkamp, President, Tweedie and Liefeldt, Members of the Court (North-Eastern Division).

Practice and Procedure—Condonation late appeal—Recording of evidence.

Held: That the excuse that a Native is an uneducated Native living in the country, is most unacceptable, but, as it appears *ex facie* the record that appellant has a reasonable chance to succeed, condonation is granted.

Held: In recording evidence, the Native Commissioner must not record " Plaintiff sworn states ", but must give full names of the plaintiff, followed by the words:—

" I am the plaintiff in this case."

Held: In lobola cases, the relationship of plaintiff to the other parties should be set out.

Appeal from the Court of the Native Commissioner, Sibasa.

Steenkamp, President, (delivering the judgment of the Court):—

Judgment in this case was entered on the 30th August, 1948, but the appeal was only noted on the 25th November, 1948, and application is now made for the condonation of the late noting. Applicant's reason for not timeously noting the appeal is that as he is an uneducated Native living in the country, he was not aware that he could appeal. This excuse is most unacceptable, but as it appears *ex facie* the record that Appellant has a reasonable chance to succeed, condonation is granted.

The summons and pleadings in this case were badly drawn up and it is difficult for this Court to come to a definite conclusion as to what the facts of the case are.

It would, however, appear that what the plaintiff intends to convey is that he is the step-father of the defendant and of defendant's sister, Mary, who in the evidence is also described as Maria, and that when he received the lobola for Mary he handed this over to the defendant. It is not clear whether defendant and Mary are legitimate. If they are legitimate children of the plaintiff's late wife, then defendant would be the holder of Mary's dowry. If they were however illegitimate, then it is possible that Mary's maternal grandfather is the holder. These points are not cleared up in the evidence or in the pleadings.

Plaintiff avers that when he received Mary's dowry he handed it over to the defendant. Mary and her husband parted and plaintiff states he then had to refund the dowry to Mary's first husband, Tom Kwinika, who obtained a judgment in the Native Commissioner's Court at Hammanskraal. Plaintiff feels that this dowry should have been returned by the defendant, seeing that he had received the dowry for Mary.

The Native Commissioner at Cullinan gave judgment for plaintiff for £30, and against this judgment an appeal has been noted to this Court on the following grounds:—

" (1) In that plaintiff did not establish any legal ground for return of the £30 alleged by him to have been paid to defendant and that he failed to establish any custom entitling him to return of the said £30;

(2) In that the Native Commissioner erred in applying the principle of unjust enrichment; and further that the Judgment is against the evidence and the weight of evidence in that the Native Commissioner erred in holding:—

(*a*) that defendant received £20 from plaintiff;

(*b*) that defendant received lobola from Messenyare Baloyi."

As pointed out above, it is not at all clear whether the defendant had been paid Mary's lobola and this should have been elucidated. This Court is left in the dark as to what the relationship of the various parties is. If it had been a donation, or if plaintiff was entitled to the lobola and he donated this to his alleged son, then of course he could not sue for the return of the donation.

The evidence has been so abbreviated as to be almost unintelligible. Plaintiff states: " I handed the money over to the defendant."—" What money ? "—He refers again to " that money ", but this time appears to refer to the second lobola, whereas in the summons he claims the first lobola. He states that he assumed defendant influenced Mary, but adduced no proof in support thereof.

In recording evidence, the Native Commissioner must not record: " Plaintiff s.s.", but must give the full names of the plaintiff, followed by the words:—

" I am the plaintiff in this case ",

and then the relationship to other parties should also be set out.

This Court has no option but to allow the appeal with costs, and to alter the Native Commissioner's judgment to read:—

" Absolution from the instance with costs "

and the plaintiff can then bring an action on a summons drawn up in a more intelligible manner.

For Appellant: Adv. Jepson instructed by M. Goldberg, Esq., Pretoria.

For Respondent: Mrs. Bresler of Pretoria.

9 JAN 1950

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

VOLUME I
Part V

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